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No. 542

In The Supreme Court of The United States

OCTOBER TERM, 1966

E. W. WIGGINS AIRWAYS, INC.,
Petitioner

v.

MASSACHUSETTS PORT AUTHORITY,
BUTLER AVIATION-BOSTON, INC.,
and BUTLER COMPANY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS BUTLER AVIATION-BOSTON, INC., AND BUTLER COMPANY, IN OPPOSITION

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QUESTION PRESENTED

Whether a treble-damage complaint under Sections 1 and 2 of the Sherman Act was properly dismissed, where the only conduct alleged to have been in violation of the Act consisted of a decision by a public instrumentality operating a public airport that fixed base operations at that airport should be the responsibility of a single operator rather than of multiple operators, and the selection of a single operator other than petitioner, one of the existing operators.

STATEMENT OF THE CASE

The District Court for the District of Massachusetts dismissed the petitioner's amended complaint (hereinafter referred to merely as "the complaint") as against all three defendants for failure to state a claim under the antitrust laws upon which relief could be granted. The Court of Appeals for the First Circuit unanimously affirmed upon the same ground.

The essential allegations of the complaint were as follows. For some years petitioner and two competitors had been conducting fixed base operations (*i.e.*, ground services) at Logan International Airport in Boston, Massachusetts, since February 1959 under lease from the respondent Massachusetts Port Authority, a "body politic and corporate" created by the Massachusetts Legislature in part for the purpose of owning and managing this public airport. Petitioner's lease expired December 31, 1959. The Authority allowed petitioner to continue its operations thereafter "as a tenant-at-will on a month-to-month basis". In July 1960 the Authority, acting through its Vice Chairman, invited petitioner, along with one of its competitors and seven other fixed base operators, including respondent Butler Co. (hereinafter Butler), to submit proposals for fixed base operations at Logan, and petitioner was one of those submitting proposals. On January 4, 1961, the Authority announced that it contemplated having only one fixed base operator at Logan, and on February 10, 1961, the Authority stated that it had selected Butler as that one. On February 21, 1961, the Authority notified petitioner to vacate its premises within 90 days.

On March 2, 1961, petitioner (and its chief competitor, whose lease had not expired) filed a complaint with the Federal Aviation Agency alleging that fixed base operation by a single operator violated 49 U.S.C. § 1349. A month and a half later, "by the middle of April 1961", petitioner had sold its property to Butler and had vacated its premises at Logan. Between that time and June of 1961, Butler operated the fixed base operation at Logan. Thereafter respondent Butler Aviation-Boston, Inc. (hereinafter Butler-Boston), a Butler subsidiary incorporated in late May of 1961, took over that operation, and subsequently executed a lease with the Authority. In February 1962, the F.A.A. ordered the Authority to allow petitioner's former chief competitor to continue its fixed base operation (which

had never been discontinued) at Logan. It made no such order as to petitioner, but made other more general orders with which the complaint alleges the Authority has not complied.

The complaint alleged that the Authority's acts were taken pursuant to a conspiracy to replace petitioner (and its chief competitor) with Butler. It demanded treble damages, and also sought extensive equitable relief, including the restoration of petitioner to substantially its prior position and cancellation of parts of the Authority's lease to Butler-Boston. As mentioned, the courts before whom this complaint has come have unanimously held that it failed to state a claim under the antitrust laws upon which relief could be granted.

ARGUMENT

I. The Decision Below is Clearly Correct.

The gist of the complaint was that pursuant to an alleged conspiracy among the three respondents, the Authority terminated petitioner's fixed base operations as a tenant at will at Logan Airport and selected Butler as the sole fixed base operator. The alleged conspiracy goes no further than this, and in this connection it should be noted that petitioner itself was entirely willing to be the sole fixed base operator if selected. (R. 11.) The proposition that the Authority's actions were not subject to a private antitrust suit is fully maintained in the brief in opposition to certiorari filed by the Authority, but certain aspects should be emphasized here.

The action of the Authority clearly was taken by it in the fulfillment of its public functions as the governmental agency — the arm of the Commonwealth of Massachusetts — that owns and manages Logan Airport. The Authority is "a purely public corporation for public purposes — an arm of the State". *Opinion of the Justices*, 334 Mass. 721,

735, 136 N.E. 2d 223, 232 (1956). Contrary to petitioner's assertion, the Authority may not "act without any supervision by the state creating" it. (Petition p. 10.) It is required to make "an annual report of its activities for the preceding fiscal year to the governor and to the general court", including an independent audit and "a complete operating and financial statement." Mass. St. 1956, c. 465, § 21. Its members may not have an interest in its contracts, sales, or leases, *id.* § 23, and may be removed by the Governor "for misfeasance, malfeasance or willful neglect of duty," *id.* § 2. The Legislature may at any time revoke or amend its governing statute. *Opinion of the Justices,* 334 Mass. 721, 735-738, 136 N.E. 2d 223, 232-233 (1956).

Leaving aside (1) the immunity of such a governmental agency from suit except to the extent of consent, (2) the limits imposed by the Constitution on the power of Congress to regulate state governmental activity, and (3) the respect for state activities conducted on state property called for in a healthy federal system, Congress has not in fact sought to make such state activity subject to the antitrust laws. *Parker* v. *Brown,* 317 U.S. 341, 350-352 (1943). *Eastern RR. Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 135-136 (1961). *United Mine Workers* v. *Pennington,* 381 U.S. 657, 669-670 (1965).

Petitioner apparently does not question this well established principle, but seeks rather to construct an exception to it where the officer or agency acts not as such but as "a participant in a private agreement or combination by others for restraint of trade." (Petition, p. 10.) Regardless of the merits of this theory, it has no application here. The complaint affirmatively shows that no such combination of private parties existed. The Authority was certainly not a private party. Of the two alleged private conspirators, only Butler was in existence when the alleged agreement with the Authority was made. Butler-Boston, Butler's subsidiary, did not come into existence until over a month after

petitioner had sold its property and vacated the premises. No other private party is alleged to have been involved.

Moreover the Authority (to say nothing of the private respondents) is alleged to have done nothing here beyond terminating petitioner's operation and selecting Butler. This is a far cry from taking an action which was one step in a plan to monopolize a whole industry throughout the state, as was the case in *Harman* v. *Valley National Bank*, 339 F. 2d 564, 566 (9th Cir. 1964), the only case petitioner cites in support of its contention. To conclude that the action taken here by the Authority, in the discharge of its statutory obligations as a state agency running a public airport, constituted "participation in a private conspiracy" rather than the legitimate action of a governmental agency would be to overthrow the firm principle of Congressional noninterference with state business.

The substantial facts alleged in the complaint acquired no additional or sinister significance by attaching to them the label of "conspiracy". Even the broadest connotation of that conclusory term would not be appropriate to describe the dealings of the respondents with each other, including the communications, meetings, and negotiations incidental to the Authority's governmental action. *Cf. Schwing Motor Co.* v. *Hudson Sales Corp.* 138 F. Supp. 899, 906 (D. Md.), *aff'd. per curiam* 239 F. 2d 176 (4th Cir. 1956), *cert. denied* 355 U.S. 823 (1957); *Packard Motor Car Co.* v. *Webster Motor Car Co.* 243 F. 2d 418, 421 (D.C. Cir.), *cert. denied* 355 U.S. 822 (1957).

To find a legitimate antitrust claim in the alleged attempt to establish Butler as the exclusive fixed base operator at Logan would interfere with the inherent monopoly one is entitled to enjoy over one's own product or property, and would result in the Authority's inability to terminate unsatisfactory licensees and operators or to change the number of such operators. See *Donovan* v. *Pennsylvania Co.* 199 U.S. 279, 295-297 (1905); *Delaware, L. & W. RR.* v. *Morris-*

town, 276 U.S. 182, 192 (1928); *Parmelee Transportation Co.* v. *Keeshin,* 292 F. 2d 794, 803-805 (7th Cir.), *cert. denied* 368 U.S. 944 (1961). Where the licensor is a state agency, the effect of such an antitrust rule would be to stultify state policy and to interfere with state regulation and control of its own property. See *Parker* v. *Brown,* 317 U.S. 341, 352 (1943); *Olsen* v. *Smith,* 195 U.S. 332, 344-345 (1904). *Cf. United States* v. *Gray Line Water Tours,* 311 F. 2d 779 (4th Cir. 1962). Here there was plainly no absolute exclusion of competition: petitioner was given opportunity to present its proposals. *Cf. Parmelee Transportation Co.* v. *Keeshin, supra,* at 803-804. No coercion whatever is alleged.

It is thus clear that the conduct of the Massachusetts Port Authority of which the petitioner complained does not support petitioner's claim under the antitrust laws. Recent cases of this Court have established that where the only activities of a private party were in conjunction with and inseparably a part of governmental activity, as is beyond question the case here, no antitrust claim is made out against those private parties. In *Eastern RR. Presidents Conf.* v. *Noerr Motor Freight, Inc.* 365 U.S. 127 (1961), the respondents were private parties who had successfully attempted to influence state action. This Court held that a private antitrust action against such private parties would necessarily impair the ability of the affected state government to act. *Id.* at 137. It also held that where lawful action was taken, the motive inspiring it was irrelevant. *Id.* at 138-139. The case is thus a square holding in respondents' favor in the present case. In *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), this Court expressly reaffirmed the main holdings of *Noerr, supra.* Again the respondents were private parties. If private parties could be attacked for accepting or even seeking the benefits of governmental action, that action — the expression of state policy — would be frustrated.

The weakness of the petitioner's complaint is further indicated by the fact that even if the acts complained of had been performed by a private party and not by an arm of the state government they would not support an antitrust claim. Petitioner's claimed damage all arises from the termination of its tenancy at the airport. The complaint affirmatively shows that petitioner had no lease and received three times the notice legally required to terminate its tenancy at will. See Mass. Gen. Laws, c. 186, § 12. Neither had petitioner any legal right to the renewal of any franchise, concession or contract, or to have its bid or proposition accepted. *Hudson Sales Corp.* v. *Waldrip,* 211 F. 2d 268, 274 (5th Cir.), *cert. denied* 348 U.S. 821 (1954). *Friend* v. *Lee,* 221 F. 2d 96, 100 (D.C. Cir. 1955). *Edelman* v. *Federal Housing Admin.* 251 F. Supp. 715, 718 (E.D. N.Y. 1966). Nor was the Authority's attempt to convert to a single fixed base operator system in violation of the Sherman Act. See *United States* v. *Yellow Cab Co.* 332 U.S. 218, 229 (1947); *Schwing Motor Co.* v. *Hudson Sales Corp.* 138 F. Supp. 899 (D. Md.), *aff'd per curiam* 239 F. 2d 176 (4th Cir. 1956), *cert. denied* 355 U.S. 823 (1957); *Packard Motor Car Co.* v. *Webster Motor Car Co.* 243 F. 2d 418 (D.C. Cir.), *cert. denied* 355 U.S. 822 (1957); *Parmelee Transportation Co.* v. *Keeshin,* 292 F. 2d 794 (7th Cir.), *cert. denied* 368 U.S. 944 (1961); *Susser* v. *Carvel Corp.* 332 F. 2d 505, 517 (2d Cir. 1964), *cert. dism.* 381 U.S. 125 (1965). *Cf. Ace Beer Distributors, Inc.* v. *Kohn, Inc.* 318 F. 2d 283 (6th Cir.), *cert. denied* 375 U.S. 922 (1963). Moreover, petitioner's alleged claim of damage arises from the termination of its tenancy at will. It does not arise from any later uncompleted attempt to terminate the operations of its competitors. This case is governed by the decisions just cited rather than by *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.* 194 F. 2d 484 (1st Cir.), *cert. denied* 344 U.S. 817 (1952), and *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 (1961), where the termination of the lease or franchise was by competitors of the excluded party,

a category into which the Massachusetts Port Authority cannot possibly be fitted. Of course, any possibly arguable violation of the Federal Aviation Act is not to be remedied by an antitrust action. See *Hunt* v. *Crumboch,* 325 U.S. 821, 826 (1945); *Parmelee Transportation Co.* v. *Keeshin,* 292 F. 2d 794, 804 (7th Cir.), *cert. denied* 368 U.S. 944 (1961); *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.* 235 F. Supp. 393, 400 (D. Idaho, 1964).

Thus, even if no governmental activity had been involved, the matters alleged in this complaint would not have constituted a violation of the antitrust laws. All of the alleged activities were, however, undertaken in the performance of governmental functions. Looking to the private respondents alone, their only conduct alleged to have been in violation of the Sherman Act was in connection with their dealings with the Massachusetts Port Authority, pursuant to that Authority's exercise of governmental operations entrusted to it by the legislature — operations repeatedly and unequivocally held by this and lower federal courts not to be within the reach of existing antitrust legislation. The decision below was thus clearly correct.

In addition to these matters going directly to the merits of the complaint, the decision was also correct because the complaint showed that petitioner's remedy, if any, was elsewhere. Petitioner claims that the change to one fixed base operator would have violated the Federal Aviation Act, 49 U.S.C. § 1349. Pursuant to that claim the petitioner sought redress before the Federal Aviation Agency, the administrative body to which the interpretation and application of this part of the Act are committed. See 49 U.S.C. §§ 1341(a), 1346, 1348. Hearings were held before examiners who issued decisions, and petitioner, objecting to the results, appealed to the Agency, which issued its decision. Either petitioner got what it was entitled to, or it could and should have sought judicial review of that decision, which it did not. Petitioner's claims that the Author-

ity thereafter failed to comply with the Agency's decision should be channeled into the appropriate proceedings for enforcement of that decision. By seeking in an antitrust suit the broad equitable relief outlined in its complaint, petitioner is in effect collaterally attacking the Agency's refusal to give it all it sought in the prior administrative proceeding, without having exhausted its direct adminstrative remedies and without allowing the Agency to formulate, maintain or defend its interpretation of the Act.

II. THE CASE PRESENTS NO QUESTION THAT THIS COURT NEED DECIDE.

This case presents no novel or important federal question. The cases cited above clearly cover the questions, as raised in this case, of the application of the antitrust laws to governmental activities (*e.g., Parker* v. *Brown, Eastern RR. Presidents Conf.* v. *Noerr Motor Freight, Inc., United Mine Workers* v. *Pennington*) and to exclusive contracts for services auxiliary to transportation centers (*e.g., United States* v. *Yellow Cab Co., Parmelee Transportation Co.* v. *Keeshin*). Airports are not significantly different from train stations and bus terminals in any respect pertinent to this case.

Neither does this case present any conflict either with applicable decisions of this Court or among the circuits. The three cases cited by the petitioner as being in conflict are distinguishable, as pointed out above. *Harman* v. *Valley National Bank*, 339 F. 2d 564 (9th Cir. 1964), involved action that was illegal under state law and was part of a conspiracy to establish an illegal statewide monopoly. The conspiracy existed before, and independently of, the entry of the State Attorney General into it. In the present case no independent or pre-existing conspiracy was alleged and the action taken was clearly authorized by the governing state statute. In *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1961), there was also a broad "unnatural" monopoly in-

tended, with no governmental agency involved, merely private competitors. In *Gamco, Inc. v. Providence Fruit & Produce Bldg.* 194 F. 2d 484 (1st Cir.), *cert. denied* 344 U.S. 817 (1952), where competitors conspired to exclude a competitor, no governmental agency was involved.

Accordingly, no conflict is presented with any applicable decision of this Court. Nor is there any conflict with the decisions in the various circuits. As indicated above, the issues presented are fully governed by settled law expounded in well-reasoned decisions of long standing.

CONCLUSION

For the reasons presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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